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November 2, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006
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FEDERAL COMMUNICATIONS COMMISSION
COMMUNICATIONS SECTION

Re: Ex Parte Communication in GN Docket No. 93-252

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(2) of the Commission's Rules, notice is hereby given of an *ex parte* communication regarding the above-referenced proceeding. On November 1, 1995, Alexandra M. Wilson, Director of Public Policy, Cox Enterprises, Inc. ("Cox"), and Werner K. Hartenberger and Peter A. Batacan on behalf of Cox, met with William E. Kennard, General Counsel, David H. Solomon, Deputy General Counsel, Peter A. Tenhula and Suzanne M. Tetreault of the FCC's Office of General Counsel.

The presentation centered on the scope of the FCC's jurisdiction over the rates, terms and conditions of interconnection between commercial mobile radio service providers and local exchange carriers. The attached memorandum, previously filed on an *ex parte* basis in CC Docket No. 94-54, was also referenced in the meeting. An original and two copies of this notice and the attached memorandum are being filed with the Secretary's office.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



Werner K. Hartenberger
Leonard J. Kennedy
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Counsel for Cox Enterprises, Inc.

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October 16, 1995

MEMORANDUM

This memorandum examines the scope of the Federal Communications Commission's ("Commission") jurisdiction over the rates and terms of interconnection between commercial mobile radio service ("CMRS") providers and local exchange carriers ("LECs"). Cox demonstrates that because of changes to the Commission's jurisdiction over CMRS under the 1993 Budget Act, the Commission has exclusive rate jurisdiction over CMRS, including rates associated with both interstate and intrastate CMRS interconnection between LECs and CMRS providers. Accordingly, there is no need for the Commission to preempt the states to order the payment of mutual compensation for the termination of traffic on the respective LEC and CMRS networks.

I. BACKGROUND

The Communications Act contains a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio" ^{1/} Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission jurisdiction "with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications" ^{2/} As the Commission has sought effective means to deregulate communications equipment or introduce new communications services into the market it has occasionally preempted states with inconsistent policies. In cases where the Commission has overstepped its jurisdictional boundary, courts have reversed the Commission. ^{3/}

The Commission's jurisdiction over communications provided by mobile radio is entirely different from the Commission's jurisdiction over landline communications. The Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") fundamentally realigned the

¹See 47 U.S.C. § 152(a).

²See 47 U.S.C. § 152(b).

³See *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("Louisiana PSC"); see also *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

balance of federal/state jurisdiction over CMRS. In the Budget Act Congress amended Section 2(b) and Section 332 and reclassified all existing mobile services as either CMRS or private mobile radio services ("PMRS").^{4/} One of the main purposes of the Budget Act was to foster the nationwide growth of wireless telecommunications by establishing a uniform federal regulatory framework for all mobile services.

Amended Sections 332 and 2(b) rewrote the traditional boundaries of jurisdiction over mobile services. The states no longer enjoy rate and entry regulation authority over CMRS providers.^{5/} Rather, their authority is limited to overseeing the "terms and conditions" of CMRS and PMRS services provided to end users. The Budget Act thus eliminated state substantive jurisdiction over wireless common carrier services. Substantive regulation of CMRS has become federalized and, because jurisdiction over CMRS is no longer divided, authority over CMRS interconnection is no longer jurisdictionally split.

Arguing that amended Sections 332 and 2(b) expressly preempts state authority over intrastate CMRS rates but does not expressly authorize the Commission to regulate intrastate CMRS rates, some have suggested that Congress may have created a "jurisdictional void" under which neither the Federal government nor the states has regulatory authority over the formerly intrastate CMRS rates.^{6/} As demonstrated in this memo, this theory is contrary to the plain language and legislative history of the Budget Act. Commission adoption of this jurisdictional void theory would nullify the Budget Act and Congress's intent that the Commission direct the evolution of wireless networks on a nationwide basis.

II. Commission Jurisdiction Over CMRS to LEC Interconnection Is Consistent With the Plain Meaning and Legislative History of Amended Sections 332 and 2(b).

Review of the Budget Act and its legislative history confirms the FCC's sole authority over CMRS to LEC interconnection. The Budget Act expands the Commission's jurisdiction to occupy the field, rather than maintaining prior limits on or restricting the Commission's jurisdiction over intrastate rates for mobile services.^{7/} Accordingly, the

^{4/}See 47 U.S.C. § 332(d).

^{5/}See 47 U.S.C. § 332(c)(3). As discussed below, the Budget Act provides that states can petition the FCC for authority to reestablish substantive regulation over CMRS providers if they can demonstrate that CMRS has become a substitute for traditional landline telephone service for a substantial portion of the public within the state.

^{6/}See Cellular Resellers Association Petition for Reconsideration, in PR Docket No. 94-105 at 6 (filed June 19, 1995).

^{7/}See McCaw Cellular Communications, Inc., Reply Comments, in PR Docket No. 94-105
(continued...)

Commission need not preempt to regulate the entire interconnection arrangement between a LEC and CMRS provider; such preemption has already occurred by statute.

1. **Section 2(b).** The Budget Act places intrastate CMRS interconnection rates under the Commission's exclusive jurisdiction by its amendments to Section 332(c) and 2(b) of the Act. Section 2(a) gives the Commission exclusive jurisdiction over all interstate telecommunications.^{8/} Section 2(b) "fences off"^{9/} from Commission jurisdiction all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" ^{10/} Under the Supreme Court's interpretation of Section 2(b) in the pre-Budget Act *Louisiana PSC* decision, the Commission is denied jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy.^{11/}

The Budget Act, however, amended Sections 332(c) and 2(b) and supersedes *Louisiana PSC* with regard to state jurisdiction over intrastate CMRS. The Commission in *Louisiana PSC* argued that it had authority under Section 220 of the Act to preempt state depreciation regulations. In rejecting this argument, the Court noted that the main clause in Section 2(b) — ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications — is itself a "rule of statutory construction . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [Section] 220."^{12/}

Congress amended the initial clause introducing Section 2(b) as a *direct limitation* on the main clause of Section 2(b), which *Louisiana PSC* termed a "rule of statutory construction." The adverbial clause limiting the main clause of Section 2(b), as most recently amended by the Budget Act, provides:

Except as provided in sections 223 through 227 of this title, inclusive, and Section 332 . . . , nothing in this chapter

(...continued)
(filed March 3, 1995) ("McCaw Reply Comments").

⁸See 47 U.S.C. § 152(a).

⁹See *Louisiana PSC*, 476 U.S. 370.

¹⁰See 47 U.S.C. § 152(b).

¹¹See *Louisiana PSC*, 476 U.S. 372-376.

¹²See *Louisiana PSC*, 476 U.S. at 373, 376-7 n.5.

shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].^{13/}

As shown below, Section 332 grants the Commission sole authority over *all* CMRS rates and entry issues. Accordingly, the plain language of Sections 2(b) and 332 of the Act, as amended by the Budget Act, reserves exclusive jurisdiction over all substantive regulation of CMRS to the Commission, without regard to their former characterization as intrastate. Stated differently, Section 2(b)'s reservation of jurisdictional authority over wireless intrastate common carrier telecommunications to the states, discussed in *Louisiana PSC*, has been eliminated.^{14/} The Supreme Court found in *Louisiana PSC* that the Commission's decision to override Section 2(b) had no legal foundation. It also observed, however, that Congress could provide a foundation.^{15/} In enacting the Budget Act in 1993, Congress did precisely what the *Louisiana PSC* found lacking in 1986 — Congress specifically delegated authority to the Commission to regulate CMRS.

Congress has amended Section 2(b) in similar circumstances to remove state jurisdiction where it was necessary or appropriate to advance a federal purpose. In restricting Section 2(b) in 1978 to except amendments to the pole attachment provisions in Section 224 of the Act, Congress stated that the amendment:

modifies existing [S]ection 2(b) . . . which limits the jurisdiction of the Commission over connecting carriers to [S]ections 201 through 205 of . . . the [A]ct. Since [the amended pole attachment provision] would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 [A]ct . . . , a conflict arises between the limitation on the Commission's jurisdiction of [S]ection 2(b) and its duty to regulate under proposed new [S]ection 224 [The amendment to Section 2(b)] removes this conflict by removing the jurisdictional limitations of [S]ection 2(b) as they would otherwise apply to proposed [S]ection 224.^{16/}

¹³See 47 U.S.C. § 152(b) (1995) (emphasis added).

¹⁴See, e.g., McCaw Reply Comments, at 5-6; GTE Service Corporation *Ex Parte* letter to William Caton from Carol Bjelland filed in PR Docket No. 94-105 on March 3, 1995 at 1 ("GTE *Ex Parte*").

¹⁵See *id.*, 476 U.S. at 373-4.

¹⁶See S. Rep. No. 95-580, 95th Cong., 1st Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. (continued...)

Similarly, when Congress enacted the telephone relay service ("TRS") provisions by adding new Section 225 to the Communications Act (as part of the Americans with Disabilities Act of 1990) and the telemarketing fraud provisions by adding new Section 228 to the Communications Act (in the Telephone Consumer Protection Act of 1991), a reference to these provisions was included in Section 2(b) to remove any limitations on the Commission's jurisdiction over the substantive provision's subject matter.^{17/}

By amending Section 2(b) to associate Section 332 with the provisions of the Act governing pole attachments, TRS requirements, and telemarketing, Section 332 read in conjunction with Section 2(b) vests the Commission with jurisdiction over CMRS. This conclusion is compelled because the adverbial clause in Section 2(b) regarding the Act's pole attachments, TRS, telemarketing and CMRS provisions nullifies the Court's direction in *Louisiana PSC* that the main clause of Section 2(b) be a "rule of statutory construction" specifying that no other provisions of the Act be construed to give the Commission jurisdiction over intrastate telecommunications.

2. **Section 332.** Section 2(b), as amended, dictates that the substantive provisions of Section 332 will determine the extent of the Commission's jurisdiction over CMRS. Section 332, in turn, as amended by the Budget Act, grants the Commission sole authority to regulate all interstate and "intrastate" rate and entry aspects of CMRS. In other words, Section 332 has so "federalized" CMRS services that the notion of an "intrastate" or "local" portion of the service has no effect on the Commission's jurisdiction.^{18/} A reading of

(...continued)
109, 134.

¹⁷See Americans With Disabilities Act of 1990, Pub. L. No. 101-336, Title IV, § 401(a), reprinted in 1990 U.S.C.C.A.N. 104 Stat. 327, 366-369 (1990); Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, reprinted in 1991 U.S.C.C.A.N. 105 Stat. 2394 (1991); Statement of President Upon Signing TCPA, reprinted in 1991 U.S.C.C.A.N. 1979 (the President stated that he "signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices . . . [and] [the] flexibility to adapt its rules to changing market conditions.").

¹⁸In the *Land Mobile Services* docket, for example, the Commission exercised exclusive jurisdiction over specialized mobile radio ("SMR") systems finding that wireless SMRs operate "without regard to state boundaries or varying local jurisdictions" and on a "nation-wide basis." See *An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz*, Memorandum Opinion and Order, Docket No. 18262, 51 F.C.C.2d 945, 972-3 (1975) ("*Land Mobile Services*"), *aff'd sub nom.*, *National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 646-7 (D.C. Cir. 1976) ("*NARUC*"). In 1982, Congress codified the Commission's finding in *Land Mobile Services* by amending Section 301 of the Act to "make clear that the Commission's jurisdiction over radio communications extends to intrastate as well as interstate transmissions" of all private land mobile radio services ("PLMRS"). See H. Rep. No. 97-

(continued...)

Section 332 according to canons of statutory interpretation as expressed in *Louisiana PSC* and other cases supports this conclusion.

As the Supreme Court explained in *Louisiana PSC*, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."^{19/} The statutory design of Section 332(c)(3)(A), which preempts state authority over rate and entry regulation of CMRS "[n]otwithstanding sections 152(b) and 221(b) of this title . . .",^{20/} shows that states are preempted from regulating intrastate CMRS rates and entry "notwithstanding" and, therefore, "without regard" to any residual jurisdiction a state may claim under Section 2(b) of the Act.^{21/} This provision also authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation.

The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted is different from the phrase "terms and conditions" of interconnection. In preserving state authority over "terms and conditions" of CMRS, the Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters."^{22/} The Commission retains exclusive jurisdiction, however, to ensure that "terms and conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory.^{23/} Because mutual compensation can be viewed as relating not only to rates but to "terms and conditions" of interconnection, the Commission retains exclusive jurisdiction to ensure the availability of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis.^{24/}

(...continued)

765, 97th Cong., 2d Sess., at 31-2 (1982) reprinted in 1982 U.S.C.C.A.N. 2237 (citing *Fisher's Blend Station Inc. v. Tax Comm'n of Washington State*, 297 U.S. 650, 655 (1936) ("all radio signals are interstate by their very nature"). In the interests of regulatory parity, the Budget Act extends the Title III jurisdictional rule that private mobile services "are interstate by their very nature" to *all* commercial mobile radio services as well.

¹⁹See *id.*, 476 U.S. at 374.

²⁰See 47 U.S.C. § 332(c)(3)(A).

²¹See *GTE Ex Parte*, at 2.

²²See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260 ("House Report").

²³See 47 U.S.C. §§ 151, 154(i), and 201.

²⁴Because the Budget Act federalizes substantive regulation of CMRS, moreover, the

(continued...)

By preempting state rate and entry authority over CMRS, Section 332 reserves to the Commission jurisdiction to "occupy the field" of substantive CMRS regulation.^{25/} In *Louisiana PSC*, the Supreme Court stated that "the critical question in any pre-emption analysis is always whether Congress intended that *federal regulation supersede state law*."^{26/} The Supreme Court's observation in *Louisiana PSC* that, absent Congressionally delegated authority, "an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State"^{27/} further supports the conclusion that Section 332 authorizes the Commission to regulate CMRS.

The forbearance provisions of Section 332(c)(1)(A) also confirm that the overall design of the statute is to vest jurisdiction over CMRS with the Commission. By authorizing the Commission to forbear from enforcing any provision of Title II, except Sections 201, 202 and 208, Section 332(c)(1)(A) places with the Commission the responsibility to determine whether enforcement of any common carriage regulation is necessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [CMRS] are just and reasonable and are not unjustly or unreasonably discriminatory."^{28/}

Furthermore, Section 332(c)(1)(C) directs the Commission to conduct "annual reports" reviewing competitive market conditions with respect to CMRS. As part of the statutorily required public interest finding the Commission must make prior to specifying a provision for forbearance, Section 332(c)(1)(C) requires the Commission to consider whether forbearance or enforcement of a provision "will promote competitive market conditions" for CMRS providers. By bestowing on the Commission sole responsibility for identifying the "competitive market conditions" to determine whether regulation is necessary to ensure just,

^{24/}(...continued)

interconnection provided by LECs to CMRS providers is entirely interstate in nature.

^{25/}*See id*; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (a preemption clause in the ERISA statute "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relates [to]' an employee benefit plan governed by ERISA"); *Gade v. Nat'l Solid Wastes Management Ass'n.*, 112 S.Ct.2374, 2384-5 (1992) (OSHA provision authorizing Secretary of Labor to approve or reject state hazardous waste removal regulations based on statutorily specified conditions "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn. The same assumption of exclusive federal jurisdiction in the absence of an approved state plan is apparent"); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

^{26/}*See id.* 476 U.S. at 369 (emphasis added) (citing *Rice et al. v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

^{27/}*See Louisiana PSC*, 476 U.S. at 374.

^{28/}*See* 47 U.S.C. § 332(c)(1)(A)(i).

reasonable and nondiscriminatory rates, Section 332(c)(1)(C) contemplates Commission authority to regulate CMRS, without regard to interstate or intrastate jurisdictional boundaries. Section 332(d), moreover, expressly states that the statutory definitions of the phrases "commercial mobile service" and "private mobile service" are to be "specified by regulation by the Commission," and that the statutory phrases "interconnected service" and "public switched network" are to be "defined by regulation by the Commission."^{29/} Delegating to the Commission the authority to define what constitutes CMRS, PMRS and "interconnected service," further exhibits Congressional intent as required by *Louisiana PSC* "that Federal regulation supersede state law."^{30/} Accordingly, the statutory framework established by Sections 2(b) and 332, as amended by the Budget Act, demonstrates Congress's intent to delegate to the Commission exclusive authority to direct CMRS substantive regulation.

Congress's intent to invest the Commission with exclusive authority over CMRS is also manifest in the provisions in the Budget Act that provide the states with an opportunity to petition for rate regulation authority. The Commission has sole authority over CMRS, unless and until a state files a petition for rate regulation authority and the Commission approves it.^{31/} The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. These provisions grant the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State."^{32/} Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary."^{33/} In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

The legislative history also supports the conclusion that the Budget Act confers upon the Commission exclusive jurisdiction over substantive regulation of CMRS providers.

²⁹See 47 U.S.C. § 332(d).

³⁰See *id.*, 476 U.S. at 369.

³¹47 U.S.C. § 332(c)(3)(A).

³²47 U.S.C. § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. See 47 C.F.R. §20.13, State Petitions for authority to regulate rates.

³³See 47 U.S.C. § 332 (c) (3)(A).

The specific jurisdictional provisions of Section 332, according to the House Report, are intended:

. . . [t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*^{34/}

In adopting the Senate's amendment of Section 2(b) to reserve exclusive jurisdiction to the Commission over all substantive regulatory matters involving CMRS, the full Committee explained in the Conference Report that:

[t]he Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act *to clarify that the Commission has the authority to regulate commercial mobile services.*^{35/}

These statements reinforce the interpretation that the Budget Act's amendments to Sections 2(b) and 332(c) gave the Commission jurisdiction over CMRS rates and entry without regard to their intrastate nature.

III. The Commission Has Sole Jurisdiction Over CMRS Interconnection Issues Because CMRS Is Part of an Interstate Network.

As discussed above, the Budget Act extends to the Commission exclusive jurisdiction over intrastate CMRS rates, regardless of the physically intrastate nature of the facilities.^{36/} But, even if the purpose of the Budget Act were not entirely transparent, the Commission and courts have consistently held that jurisdiction over communications services is to be determined by the nature of the communications, not the physical location of facilities. A call carried on intrastate facilities is jurisdictionally an interstate communication, subject to federal regulation, when the call is connected to an interstate network.^{37/} As shown below, since CMRS is part of an interstate network, CMRS calls are inherently interstate in nature and thus subject to the Commission's sole jurisdiction.

³⁴See H.R. Rep. No. 103-111, at 260 (emphasis added).

³⁵See, H.R. Rep No. 102-213, 103d Cong., 1st Sess. 494, 497 (1993) ("Conference Report") (emphasis added).

³⁶See 47 U.S.C. §§ 152(b), 332(c)(3)(A).

³⁷See *New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

For example, in *Bell System Tariff Offerings*, the Commission held that it has exclusive jurisdiction over rates, terms and conditions associated with interconnection to intrastate facilities when the local facilities are "an essential link in [] interstate and foreign communications services."^{38/} In *Lincoln Telephone*, the Court of Appeals rejected the state's argument that the Commission lacked jurisdiction over Lincoln Telephone because all of the company's facilities were located within the State. The Court of Appeals found that:

The courts . . . have never adopted such a narrow view of the Commission's jurisdiction. Rather, those facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state.^{39/}

Consistent with the boundaries on the Commission's jurisdiction as enunciated in *Louisiana PSC*, the Commission has jurisdiction, over rates, terms and conditions of interconnection, even if physically intrastate, when the facilities or services at issue substantially affect provision of interstate CMRS communications.^{40/} In this regard, both Congress in establishing the CMRS category of services in the Budget Act and the

³⁸See *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C. 2d 413, 417 (1974) ("*Bell System Tariff Offerings*"), *aff'd sub nom.*, *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974) (citing *Telerent Leasing Corp. et al., Memorandum Opinion and Order*, Docket No. 19808, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom.*, *North Carolina Util. Comm'rs*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (the Commission exercised exclusive jurisdiction over interconnection of customer premises equipment to the nationwide switched public telephone network); *United Dep't of Defense, et al.*, 38 F.C.C.2d 803 (Review Board, 1973), *aff'd* FCC 73-854 (the Commission asserted exclusive jurisdiction over Dial Restoration Panel ("DRP") equipment that was part of a nationwide defense communications system even though the facilities were used in part for transmission of intrastate communications)).

³⁹See *Lincoln Telephone*, 659 F.2d at 1109 n.85 (citing *Idaho Microwave, Inc. v. FCC*, 328 F.2d 556 (D.C. Cir. 1964); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1044-1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976)).

⁴⁰Although *Bell System Tariff Offerings* and *Lincoln Telephone* are pre-*Louisiana PSC* decisions, the holding that the Commission possesses exclusive jurisdiction to order interconnection to intrastate facilities remains valid and survives *Louisiana PSC*. In a post *Louisiana PSC* case affirming a Commission decision to preempt state regulation of BOC enhanced Centrex services, the Court of Appeals stated that "[e]ven if Centrex were a purely intrastate service, the FCC might well have authority to preemptively regulate its marketing if -- as would appear here -- it was typically sold in a package with interstate services." See *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 n.7. (D.C. Cir. 1989); see also *Petition of the Continental Telephone Company of Virginia for a Declaratory Ruling that it is not Fully Subject to the Commission's Jurisdiction Under the Communications Act of 1934*, 2 FCC Rcd 5982, 5984 (Com. Car. Bur. 1987); *Declaratory Ruling on Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, 2 FCC Rcd 1750 (1987).

Commission in implementing the Budget Act have found commercial mobile radio services to form an interstate and nationwide wireless communications network. The legislative history of the interconnection provisions of Section 332 states, for example, that Congress "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."^{41/} Defining the market for CMRS, moreover, the Commission observed that the "direction is away from a 'balkanized view'" that sees cellular, SMRs, paging, *etc.*, competing in separate markets" and noted that ownership concentration and service offering expansion is moving the majority of the wireless industry toward nationwide geographic markets.^{42/}

As the Commission has previously recognized, CMRS networks are part of a nationwide wireless "network of networks," and mutual compensation models for interconnection between landline LECs and CMRS providers are essential to the rapid and competitive build out of nationwide wireless networks. The Commission is licensing PCS using Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) that do not respect state boundaries. The Commission holds exclusive jurisdiction over the rules of the road for interconnection between LECs and CMRS providers, and all other issues regarding rates, terms and conditions of interconnection between such providers. This view is entirely consistent with the approach the Commission took in its recent examination of CMRS-to-CMRS interconnection, where the Commission did not attempt to separate interconnection into federal and state portions.^{43/}

A conclusion that the Commission lacks jurisdiction to regulate local CMRS rates is, therefore, contrary to the jurisdictional realignment of Budget Act and pre-Budget Act case law. Under *Bell System Tariff Offerings* and *Lincoln Telephone* and contrary to the *CMRS Second Report and Order*, the Commission — wholly apart from Section 332(c) — retains jurisdiction under Sections 4(i), 2(b) and 332(a) of the Act to order LECs to tariff rates, terms and conditions for interconnection to CMRS facilities, in spite of any "local" or intrastate aspects of CMRS interconnection rates. As Congress and the Commission now both have officially determined, CMRS is part of the interstate public switched telephone network. Given that interconnection between LECs and CMRS providers, and a mutual compensation model is vital to the competitive deployment of a wireless "network of

⁴¹See House Report, at 261.

⁴²See *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, FCC 95-317, at ¶¶ 59, 63-4 (released August 18, 1995).

⁴³See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408, 5460 (1994).

networks," the Commission retains exclusive jurisdiction over rates, terms and conditions of interconnection.

IV. The Commission Must Restate its Jurisdiction to Avoid Confusion.

In the *CMRS Second Report and Order*, the Commission exercised its statutory authority to forbear from applying Section 203 of the Act to require CMRS providers to tariff their rates.^{44/} In reaching this conclusion the Commission observed that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates."^{45/} As discussed above, this conclusion reflects a pre-Budget Act, traditional Section 2(b) analysis over the scope of the Commission's CMRS jurisdiction that is inaccurate. This jurisdictional statement must be clarified to conform with the Commission's actual jurisdiction over CMRS-to-LEC interconnection.

Several parties seeking clarification or reconsideration have questioned the Commission's jurisdictional findings in the *CMRS Second Report and Order*. For example, McCaw and MCI urge the Commission to clarify that it retains exclusive jurisdiction with regard to mutual compensation between LECs and CMRS providers regardless of the degree of physically intrastate facilities involved. Pursuant to the analysis laid out above, Cox supports such clarification.

The Commission has exclusive jurisdiction to require LECs and CMRS providers to comply with a federal model of mutual compensation for interconnection. The language of the Budget Act demonstrates that Congress has granted the Commission sole authority over the rates, terms and conditions of CMRS interconnection, without regard to the physically intrastate location of facilities or the otherwise intrastate nature of a call. Other jurisdictional theories would nullify Congressional intent to establish an interstate, nationwide wireless "network of networks." There thus is an urgent need to correct the misstatement in the *CMRS Second Report and Order's* concerning the full extent of the Commission's jurisdiction. The Commission cannot and should not forbear from jurisdiction specifically found to be in the public interest and granted to the Commission by the Budget Act. The Commission rather should state that it has exclusive jurisdiction to adopt uniform federal policy governing rates, terms and conditions associated with CMRS interconnection, regardless of the physically "local" or intrastate situation of CMRS facilities.

⁴⁴See *Second Report and Order*, 9 FCC Rcd 1411, at 1479-1480 (1994) ("CMRS Second Report and Order").

⁴⁵See *id.*, 9 FCC Rcd at 1480.